

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY**



**IN RE: Mary Oates Walker and Kiyo
Oden Tyson,**

Respondents

CASE No.: 1060-001

MEMORANDUM OPINION

I. Introduction

Respondent Mary Oates filed a Response to Amended Notice of Violation (“Response”),¹ in which she includes, among other things, three additional grounds for dismissal. The grounds are based on the contentions that the Ethics Act² does not authorize bringing actions against former District government employees; that she continues to be denied due process in this case, especially because she has been denied an equal opportunity to conduct discovery as the Director of Government Ethics; and that the Ethics Act does not authorize bringing charges based on obstruction, as alleged in Counts 10, 11, 12, 13, 14, and 15 of the Amended Notice of Violation.

For the following reasons, the Board DENIES each of these grounds for dismissal.

II. Discussion

A. The Board’s Jurisdiction Over Former Employees

Respondent Walker relies on the fact that she is “no longer an employee of the District,” Response at 1, to contend that “[t]he Ethics Act does not contain any provisions permitting [the continuance of an] investigation for [District Personnel Manual]³ personnel infractions after the subject of the investigation no longer works for the District.” *Id.*

¹ On May 29, 2014, we granted the request of the Director of Government Ethics to amend the Notice of Violation and ordered that a substantively identical Amended Notice of Violation be deemed filed.

² Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (“Ethics Act”), effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq.*).

³ The Board has the power to, among other things, “[a]dminister and enforce the Code of Conduct.” Ethics Act section 202(a)(1) (D.C. Official Code § 1-1162.02(a)(1) (2013 Supp.)). The Code of Conduct is defined by section

This contention has no merit. Section 221(d) of the Ethics Act (D.C. Official Code § 1-1162.21(d) (2013 Supp.)), provides that “[a]ll actions of the Ethics Board...to enforce the provisions of [the Ethics Act] must be initiated within 5 years of discovery of the alleged violation.” Here, the original Notice of Violation was issued on February 6, 2014, a time when Respondent Walker not only was employed by the District government, but also was within five years of the dates of the alleged conduct underlying all the counts against her. The fact that Respondent Walker was subsequently terminated from her position and is no longer employed by the District government has no effect on the Board’s jurisdiction.

B. Procedural Due Process

Respondent Walker alleges that she “has been denied due process throughout these proceedings and has been further denied an equal opportunity to conduct discovery as the Director of Government Ethics.” Response at 4.⁴ More specifically, she asserts that “[the Director of Government Ethics] has had countless interviews secured through a compelled process and the ability to freely subpoena records without any limitations as to scope or breadth, and without providing [her] notice or being required to apply for issuance of a subpoena from [the Board].” *Id.*

This contention also lacks merit. What Respondent Walker fails to appreciate is that the “discovery” conducted by the Director in the early stages of this case was not discovery at all. It was, as the Director points out, “part and parcel of the investigation” into Respondent Walker’s possible ethical violations. See Opposition at 5; see also *Jim Graham v. District of Columbia*, Case No. CA 001484 P (MPA), Memo. Op. at 1-2 (D.C. Sup. Ct. July 3, 2013) (discussing Ethics Act’s “two-stage process for BEGA to investigate and adjudicate possible ethical violations by public officials or employees”).

For due process purposes, the distinction between investigation and adjudication is critical. See *S.E.C. v. Jerry T. O’Brien, Inc.*, 467 U.S. 735 (1984), where the targets of a Securities and Exchange Commission (“SEC”) investigation brought action to enjoin the investigation and to prevent third-parties from complying with SEC subpoenas. The Court held that the targets were not entitled to notice of the issuance of subpoenas to third-parties. *Id.* at 742 (“The Due Process Clause is not implicated under such circumstances because an administrative investigation adjudicates no legal rights[.]” (citing *Hannah v. Larche*⁵)). See also *Aponte v. Calderon*,

101(7)(E) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(E)) to include “Chapter 18 of Title 6B of the District of Columbia Municipal Regulations,” which regulations are otherwise commonly known as the District Personnel Manual.

⁴ To the extent that Respondent Walker maintains that she “has been denied due process throughout these proceedings,” this ground in the Response, at least as an attempted basis for dismissal, is not new. She raised a lack of due process as a part of her motion to dismiss the original Notice of Violation. We denied the motion in our Memorandum Opinion and Order of April 3, 2014. Accordingly, that denial operates to dispose of the present ground, except to the extent that it relies on the theory of unequal opportunity to conduct discovery.

⁵ *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (“[W]hen governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.”)).

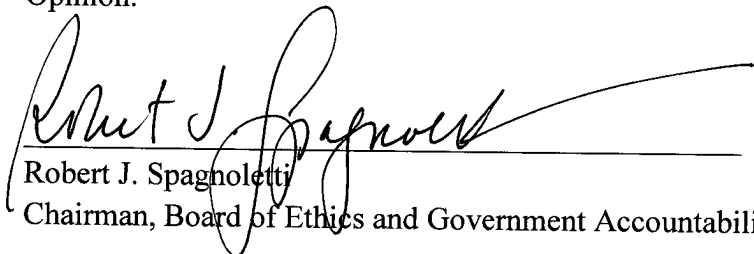
284 F.3d 184, 193 (1st Cir. 2002) (“[I]t is clear that investigations conducted by administrative agencies, even when they may lead to criminal prosecutions, do not trigger due process rights.” (discussing *O’Brien*)); *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich. App. 696, 708, 736 N.W.2d 594, 602 (Mich. Ct. App. 2007) (“Due process principles are ‘not implicated’ in circumstances where an administrative agency employs its subpoena power to investigate an individual subject to its regulatory authority ‘because an administrative investigation adjudicates no legal rights.’” (quoting *O’Brien*, 467 U.S. at 742); *State ex rel. Hoover v. Smith*, 198 W.Va. 507, 516, 482 S.E.2d 124, 133 (W.Va. 1997) (“Given the due process afforded the physician during the ‘contested case’ stage of the medical disciplinary proceeding, we conclude that generally the physician need not be accorded the right to obtain subpoenas for pre-hearing discovery depositions during the investigatory stage.”)

C. The Board’s Authority to Bring a Charge Based on Obstruction


Repeating an argument raised in her motion to dismiss the original Notice of Violation, Respondent Walker again contends that the Board has no authority to bring a charge based on obstruction. Response at 5. Having already considered and rejected the contention, *see* Memorandum Opinion of April 3, 2014, at 7-8, our ruling stands as the law of this case and, as such, operates to dispose of the present ground to dismiss.

IV. Conclusion

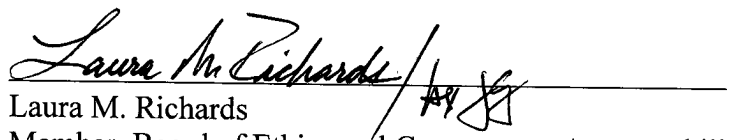
Based on the foregoing reasons, it is the decision of the Board to DENY each of Respondent Walker’s additional grounds to dismiss. An appropriate Order accompanies this Memorandum Opinion.


Robert J. Spagnoletti
Chairman, Board of Ethics and Government Accountability

6/25/14
Date


Deborah A. Lathen
Member, Board of Ethics and Government Accountability

6/25/14
Date


Laura M. Richards
Member, Board of Ethics and Government Accountability

6/25/14
Date

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY**



**IN RE: Mary Oates Walker and Kiyo
Oden Tyson,**

Respondents

CASE No.: 1060-001

ORDER

THIS MATTER comes on upon Respondent Mary Oates Walker's Response to Amended Notice of Violation, in which she includes three additional grounds for dismissal, and upon the opposition of the Director of Government Ethics thereto; and

IT APPEARING, for the reasons stated in the accompanying Memorandum Opinion, that the additional grounds are without merit; it is, therefore

ORDERED that the additional grounds for dismissal raised in Respondent Walker's Response to Amended Notice of Violation be, and hereby are, DENIED.

This Order is effective after approval by the Board, as demonstrated by the signature of the Chairman below.


Robert J. Spagnoletti

Chairman, Board of Ethics and Government Accountability

6/25/14
Date